1992

State of Utah v. Van D. Scott : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DOCKET NO. 920702

STATE OF UTAH,

Plaintiff/Appellee, : Case No. 920702-CA

v. :

VAN D. SCOTT, : Priority No. 2

Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR BURGLARY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1990); THEFT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-6-404 (1990), FOR BEING A HABITUAL CRIMINAL IN VIOLATION OF UTAH CODE § 76-8-1001 (1990), IN THE 2ND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE JUDGE RONALD O. HYDE, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1990); theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1990); and being a habitual criminal, in violation of Utah Code Ann. § 76-8-1001 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Is the evidence sufficient to support defendant's conviction for theft?

In reviewing a claim of insufficient evidence, Utah appellate courts view the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Booker, 709 P.2d 342, 345 (Utah 1985); State v. Lemons, 844 P.2d 378, 381 (Utah App. 1992). A jury verdict will only be reversed where reasonable minds must have entertained a reasonable doubt that defendant committed the crime of which he was

convicted. State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989); Lemons, 844 P.2d at 381.

2. Did the trial court abuse its discretion in enhancing defendant's sentence based on a finding of habitual criminal?

This Court reviews the trial court's imposition of sentence "to discover any abuse of discretion[.]" State v. Rhodes, 818 P.2d 1048, 1049 (Utah App. 1991). Where the particular issues raised concern a question of law, a correction of error standard is employed. Id. "For questions of fact, frequently constituting threshold inquiries that must be satisfied prior to addressing the legal intricacies, a 'clearly erroneous' standard applies." Id. at 1049-50 (quoting State v. Ramirez, 817 P.2d 774, 781 n.3 (Utah 1991)). Further, a correctness review "necessarily incorporates" review of the lower court's factual findings including any associated credibility determinations. Id. at 1050 (quoting Ramirez, 817 P.2d at 781 n.3)). "This subsidiary determination will be overturned only if clearly erroneous." Id.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1990); theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404

(1990); and being a habitual criminal in violation of Utah Code Ann. § 76-8-1001 (1990).[1]

Following a jury trial on the burglary and theft charges, defendant was convicted as charged (R. 98-99). Because defendant waived his right to a jury trial on the habitual criminal charge, the trial court made that determination under section 76-8-1001 (Transcript of jury trial, February 25, 1991 [hereinafter T.] at 106-09) (a copy of the trial court's determination of the habitual criminal charge is contained in the Addendum).

The trial court then sentenced defendant to concurrent terms of zero to five years for burglary, and to an enhanced term of five years to life for theft under section 76-8-1001 (R. 110-11; T. 106-09, see Addendum).

STATEMENT OF THE FACTS

Scott Vanleeuwen, owner of the Gift House, a pawn shop and sporting goods store located at 120 - 25th Street, Ogden, Utah, worked after closing time on September 26, 1990, preparing for an anticipated "deer season rush" (T. 8-10). Before leaving the Gift House at approximately 7:15 p.m. that evening, Vanleeuwen set an alarm that was "wired directly to the police department" (T. 10). After securing the store, Vanleeuwen exited the front entrance and walked east on 25th Street where he noticed two black men loitering nearby (T. 11). As Vanleeuwen approached his truck parked approximately two to three hundred feet from the Gift House, he

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[1] Section 76-8-1001 was amended, effective April 29, 1991, which amendment is not material to the issues raised here.

observed that the two men split up (T. 12). One went "around the side of a building and the other walked into a doorway, put his back to [Vanleeuwen]" and urinated (T. 12). Vanleeuwen was not able to see either man's face (T. 12). Although Vanleeuwen was initially concerned by the men's behavior, it was not unusual to see "transient[s]" in the area and he dismissed the incident and continued home (T. 13, 26).

Upon arriving home at approximately 8:00 p.m., Vanleeuwen learned the police had telephoned and that the Gift House had been burglarized (T. 13). Vanleeuwen immediately returned to the Gift House where he observed that the front entrance had been kicked in (T. 14). Inside the store, Vanleeuwen saw "jewelry scattered on the floor" (T. 14). Additionally, he observed that "the jewelry case was smashed in[,]" and there was "[a] lot of blood on the floor" (T. 14). He further observed a rock laying in the middle of the "rubble" (T. 14). Vanleeuwen followed a blood trail from the front entrance across 25th Street and into a vacant lot approximately 100 yards south of the Gift House, recovering some of the missing jewelry along the way (T. 18, 24). Vanleeuwen estimated that approximately $15,000 worth of merchandise was taken (T. 22).

Investigating officers continued following the blood trail which led to an apartment complex located at 140 - 28th Street (T. 79). The blood trail entered apartment #9 where it ended in the bathroom (T. 79-80). Although the officers determined the suspect was no longer in the apartment, there was no blood

trail leaving the apartment (T. 80). Upon talking to the resident, Albert Taylor, police learned that Taylor had given defendant a towel to stop a bleeding wound (T. 80). Defendant, whom Taylor had known for years, did not explain how he injured himself (T. 91).

From Taylor's apartment, police searched a home located at 132 Doxey Street at the request of the residents who thought they had heard someone inside the house (T. 80). A blood soaked towel matching the description given by Taylor was found in the backyard of the residence (T. 79-80). Officers continued searching for another one/half hour before a search dog was brought in to assist (T. 81). The search dog picked up the blood trail near Doxey Street and followed it northeast to a nearby vacant field where defendant was discovered "lying on the ground with his shirt off. He had his shirt around his wrist which was bleeding" (T. 81). No jewelry or other property belonging to the Gift House was found on defendant's person at the time of his apprehension (T. 85).

Defendant was administered first aid for his wound and transported to McKay Hospital where he was given Miranda[2] warnings (T. 83). Defendant agreed to speak to investigating officers and at first denied involvement in the burglary/theft of the Gift House (T. 83-84). However, when he was informed that the officers had followed a blood trail from the Gift House to his hiding place, defendant requested a "deal" (T. 83). Specifically, defendant offered to "give up" some "drug people" and plead to a lesser

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[2] See Miranda v. Arizona, 384 U.S. 436 (1966).

offense (T. 84). When Officer Clements, of the Ogden City Police Department, told defendant he lacked authority to make a deal, defendant indicated he was still willing to talk (T. 84). Defendant then admitted to Officer Clements

> that he was with another black male by the name of Charles out in front of the Gift House. That the other black male . . . kicked in the Gift House Door. That he went into the business with the [sic] Charles and he smashed out the jewelry window inside the business.

(T. 84). Although defendant admitted smashing the glass display case, he denied taking anything, claiming instead that "Charles took everything" (T. 85).[3] Defendant repeated essentially the same story when he was later questioned by a second officer (T. 96, 100).

Kevin M. Patrick, a serologist at the Utah State Crime Lab analyzed the blood on defendant's shirt and blood samples taken from the glass display case inside the Gift House (T. 57). Patrick found type O antigens on both defendant's shirt and the display case blood samples (T. 60-61). Further, Patrick performed a more precise blood identification test and determined that the blood samples had the same standard band structure of 2-A, 2-B (T. 62-65). Based on these results, Patrick concluded that while 45% of the population have type O blood, only 2.5% of the population have standard 2-A, 2-B blood, and that only 1.2% of the population have both type O and standard 2-A, 2-B blood (T. 65-66).

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[3] Charles Booker was tried and convicted for his involvement in the burglary and theft of the Gift House (T. 85).

Defendant did not testify at trial or otherwise present a defense to the charges.

SUMMARY OF THE ARGUMENT

The Court should not consider defendant's challenge to the sufficiency of the evidence to support his theft conviction because defendant has not properly marshaled the evidence supporting the jury's verdict. Even if the Court were to consider the merits of defendant's claim, there was ample evidence before the jury to sustain defendant's conviction.

Additionally, the trial court properly relied on defendant's conviction for second degree felony theft to trigger application of the habitual criminal statute and to impose an enhanced sentence.

ARGUMENT

POINT I

THE EVIDENCE IS SUFFICIENT TO SUPPORT DEFENDANT'S THEFT CONVICTION

In Point I of his brief, defendant challenges the sufficiency of the evidence to support his theft conviction (Br. of App. at 5-9). His argument should be rejected for failure to comply with the marshaling requirements of State v. Moore, 802 P.2d 732, 783 (Utah App. 1990).

The power of this Court to review a jury verdict challenged on sufficiency of evidence is "quite limited." Id. As this Court has recognized, "[i]n challenging the sufficiency of the evidence, the burden on the defendant is heavy. Defendant must 'marshal all evidence *supporting* the jury's verdict and must then

show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict.'" State v. Lemons, 844 P.2d 378, 381 (Utah App. 1992) (citations omitted).

Defendant has failed to meet this purposefully heavy burden. Rather than marshaling all the evidence supporting the jury's verdict and then demonstrating how the marshaled evidence is insufficient, defendant broadly asserts there was "no" evidence to support his theft conviction and further attempts to blend the evidence supporting the verdict with that which he believes conflicts with the verdict. In essence, defendant merely reargues the relative merits of the testimony presented to the jury. However, this Court does not sit as a jury, and defendant's attempt to reargue the evidence presented at trial is therefore not a proper method for challenging the sufficiency of the evidence. Accordingly, the Court should refuse to consider defendant's insufficiency of evidence claim based on defendant's failure to properly marshal the evidence supporting the jury's verdict.

Even if this Court were to consider defendant's challenge to the sufficiency of the evidence, there was ample evidence to support defendant's conviction. Rather than recount the evidence supporting defendant's conviction, the State refers the Court to the Statement of the Facts at pp. 3-7, supra. Viewed in its proper light on appeal, the evidence presented at trial provides substantial support for the jury's verdict. This Court should therefore reject defendant's sufficiency challenge.

POINT II

THE TRIAL COURT'S IMPOSITION OF AN ENHANCED SENTENCE UNDER UTAH CODE ANN. § 76-8-1001 (1990) WAS PROPER

In Point II of his brief, defendant narrowly asserts that "[i]f he was not guilty of theft then he was not convicted of a second degree felony as required by [Utah Code Ann. § 76-8-1001 (1990)] and therefore his sentence was in error" (Br. of App. at 10). Defendant's assertion lacks merit and should be rejected.

Section 76-8-1001 provides as follows:

> Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

Defendant does not contest the adequacy of his prior felony record to support the imposition of an enhanced sentence under section 76-8-1001. Thus, the only issue is the trial court's reliance on defendant's instant theft conviction to trigger application of the enhancement statute (T. 106-09, see Addendum). For reasons set forth in Point I, supra, the evidence is sufficient to support defendant's theft conviction, a second degree felony. Accordingly, the trial court did not abuse its discretion in relying on the theft conviction to enhance defendant's sentence under section 76-8-1001.

CONCLUSION

Based on the foregoing arguments, defendant's theft conviction, and the trial court's consequent imposition of an enhanced sentence should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of August, 1993.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to JOHN T. CAINE, PUBLIC DEFENDER ASSOCIATION, attorney for appellant, 2568 Washington Boulevard, Ogden, Utah 84401, this 17th day of August, 1993.

Marian Decker

ADDENDUM

RECENT CASES, JOHN.

MR. CAINE: LET'S SEE, WE NEED THE SECOND. HAVE YOU GOT THAT?

MR. DECARIA: YEAH, I GOT --

MR. CAINE: ONE OF THEM NEEDS TO BE A SECOND.

MR. DECARIA: ONE OF THEM'S A SECOND. LOOK AT THE SENTENCE ON THE BACK.

THE COURT: NEEDS TO BE TWICE CONVICTED, SENTENCED, AND COMMITTED.

MR. CAINE: AT LEAST ONE'S A SECOND.

THE COURT: AT LEAST ONE.

MR. CAINE: THESE ARE BOTH THIRDS --

MR. DECARIA: ARE THEY?

MR. CAINE: -- MARK. YEAH. YOU KNOW, THERE'S ONE, I'M JUST -- THERE IT IS, RIGHT THERE. OKAY. LET ME JUST GO OVER THESE WITH YOU. YOUR HONOR, I'VE -- ARE WE ON THE RECORD STILL?

THE COURT: YEAH.

MR. CAINE: WE'RE NOW IN THE ENHANCEMENT PHASE OF THE PROCEEDINGS. COUNT THREE OF THE INFORMATION ALLEGES THAT MR. SCOTT IS A HABITUAL CRIMINAL, AND I HAVE ADVISED MR. SCOTT THAT THE LAW IN THIS STATE REQUIRES THAT IN ORDER TO PROVE THAT IN EFFECT THIS ENHANCEMENT OR STATUS, THE STATE MUST PROVE THAT HE'S BEEN TWICE PREVIOUSLY CONVICTED AND IMPRISONED, AND ONE OF THOSE OR BOTH ARE FELONIES HAVING BEEN

AT LEAST A SECOND DEGREE FELONY. AND THEN HAVING A SUBSEQUENT CONVICTION FOR A SECOND DEGREE FELONY. I HAVE BEFORE ME MARKED AS STATE'S EXHIBIT 18 A DOCUMENT SHOWING A CONVICTION AND A COMMITMENT FOR BURGLARY, A THIRD DEGREE FELONY, ON SEPTEMBER 22, 1984, JUDGE OMER CALL OF THE FIRST JUDICIAL DISTRICT. AND ALSO EXHIBIT NUMBER 19, A COMMITMENT BY YOUR HONOR OF THE SECOND JUDICIAL DISTRICT ON THE 28TH OF JANUARY 1982 FOR A BURGLARY, A SECOND DEGREE FELONY.

MR. SCOTT HAS SEEN THOSE, AND YOU WERE IN FACT THE SAME INDIVIDUAL THAT WAS COMMITTED ON THOSE COMMITMENTS, WERE YOU NOT?

MR. SCOTT: UH-HUH.

THE COURT: WHAT DO YOU HAVE --

MR. CAINE: THE OTHER IS -- THERE'S EXHIBIT NUMBER 20. WELL, IT'S A DIFFERENT CASE. I THOUGHT IT WAS THE SAME ONE. THIS IS ALSO A COMMITMENT BY YOUR HONOR, A BURGLARY WITH A ONE TO 15 YEARS SENTENCING, BEGINS FEBRUARY 5TH, 1982, IT WAS CONCURRENT WITH EXHIBIT NUMBER 19, BUT THEY WERE SEPARATE CHARGES. AND THE FOURTH ONE IS AGAIN A SENTENCE BY YOUR HONOR, A THIRD DEGREE BURGLARY, DATED THE 9TH DAY OF FEBRUARY 1987. THAT'S EXHIBIT NUMBER 17. AND FRANKLY, THAT COMPORTS WITH OUR UNDERSTANDING OF WHAT HIS PRIOR FELONY RECORD IS.

THE COURT: YOU'RE OFFERING THOSE FOR EXHIBITS?

MR. DECARIA: I AM, YOUR HONOR.

THE COURT: ANY OBJECTION?

MR. CAINE: NO OBJECTION.

THE COURT: ALL RIGHT. EACH IS ADMITTED. DO YOU HAVE ANYTHING FURTHER?

MR. DECARIA: NOTHING FROM THE STATE.

MR. CAINE: WE HAVE NOTHING, YOUR HONOR.

THE COURT: SUBMIT IT?

MR. DECARIA: YES.

MR. CAINE: YES.

THE COURT: WELL, THEN, IT APPEARS THAT HE FITS THAT, HE HAS AT LEAST TWICE BEEN SENTENCED -- CONVICTED, SENTENCED, AND COMMITTED ON AT LEAST TWO PREVIOUS FELONIES OF WHICH AT LEAST ONE WAS A SECOND DEGREE FELONY, AND NOW HAS BEEN CONVICTED OF AN ADDITIONAL SECOND DEGREE FELONY, WHICH WOULD PLACE HIM UNDER THE STATUS OF BEING A HABITUAL CRIMINAL.

MR. CAINE: YOUR HONOR, THE DEFENDANT HAS ADVISED ME THAT HE WOULD PREFER TO HAVE SENTENCE IMPOSED TODAY AND WAIVE THE TIME.

THE COURT: IS THAT CORRECT?

MR. SCOTT: YEAH.

THE COURT: YOU'RE ENTITLED TO ADDITIONAL TIME. YOU UNDERSTAND THAT?

MR. SCOTT: YEAH.

THE COURT: BUT I UNDERSTAND YOU'RE A RESIDENT ANYWAY.

MR. CAINE: YES, HE'S PRESENTLY SERVING A SENTENCE AT

THE UTAH STATE PRISON.

THE COURT: WELL, ON THE FINDING OF GUILT OF THE OFFENSE OF COUNT ONE, BURGLARY, A THIRD DEGREE FELONY, YOU ARE SENTENCED TO SERVE A TERM IN THE STATE PENITENTIARY NOT TO EXCEED FIVE YEARS. ON THE FINDING OF GUILT OF THE OFFENSE OF COUNT TWO, THEFT, A SECOND DEGREE FELONY, TOGETHER WITH THE FINDING THAT HE WOULD BE WITHIN THE STATUS OF A HABITUAL CRIMINAL, THE PENALTY IS ENHANCED TO A TERM OF NOT LESS THAN FIVE YEARS AND MAY BE FOR LIFE.

MR. CAINE: WE'D ASK THOSE RUN CONCURRENTLY, YOUR HONOR.

THE COURT: I'LL ALLOW THEM TO RUN CONCURRENTLY.

MR. CAINE: THANK YOU.

THE COURT: ANYTHING FURTHER?

MR. SCOTT: NO.

MR. CAINE: NO, WE HAVE NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. THEN WE'LL BE IN RECESS.

*****

CERTIFICATE

STATE OF UTAH)
) SS
COUNTY OF WEBER)

THIS IS TO CERTIFY THAT THE FOREGOING 109 PAGES OF TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

DATED AT OGDEN, UTAH THIS 21ST DAY OF DECEMBER 1992.

Dean C. Olsen

DEAN C. OLSEN